11 Am. Jur. 2d Bills and Notes III A Refs.

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III. Consideration

A. In General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 12, 40, 90, 92(4)

A.L.R. Library

A.L.R. Index, Bills and Notes
A.L.R. Index, Consideration
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III. Consideration

A. In General

§ 119. Necessity of consideration

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 90

A negotiable instrument is a simple contract,[1] and, as such, one of its essential elements is sufficient consideration.[2] Under contract principles, a promissory note must be supported by consideration to be enforceable,[3] and a note for which there is no consideration cannot be enforced.[4] A joint note, however, does not require joint consideration.[5]

The distinction between value and consideration in Article 3 of the Uniform Commercial Code is a very fine one;[6] outside Article 3, anything that is consideration is also value.[7] A different rule applies in Article 3, if an instrument is issued for value it is also issued for consideration.[8] "Consideration" means any consideration sufficient to support a simple contract,[9] and if an instrument is not issued for consideration the issuer has a defense to the obligation to pay the instrument.[10] "Value," on the other hand, is relevant to, and has primary importance in cases involving the issue of whether a holder is a holder in due course.[11] Anything, however, that constitutes value also constitutes consideration.[12]

Footnotes

1 C.I.T. Corp. v. Panac, 25 Cal. 2d 547, 154 P.2d 710, 160 A.L.R. 1285 (1944).

2 Shipley Co. v. Rosemead Co., 100 Cal. App. 706, 280 P. 1017 (2d Dist. 1929); Florida Nat. Bank & Trust Co. of Miami v. Brown, 47 So. 2d 748 (Fla. 1949).
For a general discussion of consideration as an essential element to the validity of a contract, see Am. Jur. 2d, Contracts §§ 101 to 166.

3 Sirius LC v. Erickson, 144 Idaho 38, 156 P.3d 539, 62 U.C.C. Rep. Serv. 2d 411 (2007).

4 In re Rolling Thunder Gas Gathering, L.L.C., 348 B.R. 803 (Bankr. D. Kan. 2006) (applying Colorado law); Prudential Preferred Properties v. J and J Ventures, Inc., 859 P.2d 1267 (Wyo. 1993).
Money that a mother gave to a son for a down payment on a home did not constitute "valuable consideration" for a promissory note in which the son promised to pay the mother $100,000, and thus the note lacked consideration and was not enforceable, where the transfer of the down payment money was memorialized in a gift letter, which the mother and son both signed, stating that the son was under no obligation to repay the mother and that the gift was subject to no terms or conditions. Lewis v. Ikner, 349 Ga. App. 21, 825 S.E.2d 443 (2019).

5 Nikou v. INB Nat. Bank, 638 N.E.2d 448 (Ind. Ct. App. 1994).

6 Official Comment 1 to U.C.C. § 3-303.

7 Official Comment 1 to U.C.C. § 3-303.

8 Official Comment 1 to U.C.C. § 3-303.

9 § 122.

10 Official Comment 1 to U.C.C. § 3-303.

11 Official Comments 1, 2 to U.C.C. § 3-303.
As to what constitutes a holder in due course, see §§ 214 to 223.

12 § 123.

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III. Consideration

A. In General

§ 120. Adequacy of consideration

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 92(4)

Good consideration exists in the nature of a benefit to the promisor or a detriment to the promisee.[1] Thus, if there is a benefit to the promisor and a detriment to the promisee, a promissory note is supported by adequate consideration.[2] As long as something of real and legally cognizable value is given in exchange for a promise to pay under a promissory note, the note is supported by adequate consideration.[3]

Courts generally will not inquire into the adequacy of consideration for the making of a note.[4] The law concerns itself only with the existence of legal consideration for a bill or note,[5] and it will not weigh the quantum of detriment suffered by the promisee any more than it will weigh the quantum of benefit received by the promisor.[6] As long as there is some consideration, the law will not attempt to measure the amount.[7] The mere inadequacy of the consideration is not within the concern of the law,[8] unless the inadequacy of the consideration is so gross as to prove fraud or undue influence.[9]

Footnotes

1 Whelan v. Swain, 132 Cal. 389, 64 P. 560 (1901).

2 Kissinger v. Genetic Evaluation Center, Inc., 260 Neb. 431, 618 N.W.2d 429 (2000).
Promissory note on which the seller of a chiropractic practice sued the buyers was supported by adequate consideration, where the buyers took immediate possession of the seller's business and began operating it as their own. West v. Diduro, 312 Ga. App. 591, 718 S.E.2d 815 (2011).

3 Holman Street Baptist Church v. Jefferson, 317 S.W.3d 540, 72 U.C.C. Rep. Serv. 2d 899 (Tex. App. Houston 14th Dist. 2010).

4 Rybak v. Dressler, 178 Ill. App. 3d 569, 127 Ill. Dec. 366, 532 N.E.2d 1375 (2d Dist. 1988).

Supreme Court would not consider the adequacy of consideration supporting a promissory note which the mortgagor executed in favor of the mortgagee limited liability company, which was wholly owned by the mortgagor's former attorney, that secured payment for the services an attorney rendered to the mortgagor in a bankruptcy proceeding, in light of the evidence of some consideration supporting the note, including the attorney's performance of certain bankruptcy services, and no showing of any limited exception to allow the court to consider the adequacy of such consideration. Sirius LC v. Erickson, 150 Idaho 80, 244 P.3d 224 (2010).

5 Johnson Lumber & Supply Co. v. Byron, 113 So. 2d 577 (Fla. 2d DCA 1959).

6 Whelan v. Swain, 132 Cal. 389, 64 P. 560 (1901).

A purchasers' claim that consideration was inadequate because the face amount of promissory note exceeded the value of the real estate they acquired was not a basis for avoiding their contractual obligation to remit payment on promissory note. Crotona 1967 Corp. v. Vidu Bros. Corp., 925 F. Supp. 2d 298 (E.D. N.Y. 2013) (under New York law).

7 Poggetto v. Bowen, 18 Cal. App. 2d 173, 63 P.2d 857 (3d Dist. 1936).

8 Johnson Lumber & Supply Co. v. Byron, 113 So. 2d 577 (Fla. 2d DCA 1959); In re Taylor's Estate, 251 N.Y. 257, 167 N.E. 434 (1929).

9 Wilbur v. Griffins, 56 Cal. App. 668, 206 P. 112 (1st Dist. 1922).

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III. Consideration

A. In General

§ 121. Recital of consideration

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 12, 40

Forms

Forms relating to recital of consideration, see Am. Jur. Legal Forms 2d, Uniform Commercial Code [Westlaw®(r) Search Query]

A recital of consideration in a promissory note may be required in certain situations.[1] The statement "for value received" in a note has been held to be a sufficient recital or allegation of consideration by some authority,[2] although it has been held insufficient by other authority.[3]

Footnotes

1 Hayter v. Dinsmore, 125 Kan. 749, 265 P. 1112 (1928); Formica Const. Co., Inc. v. Mills, 9 Misc. 3d 398, 801 N.Y.S.2d 713, 58 U.C.C. Rep. Serv. 2d 605 (N.Y. City Civ. Ct. 2005); McGovern v. Kraus, 200 Wis. 64, 227 N.W. 300, 67 A.L.R. 1381 (1929).

2 Stolzenbach v. Pagoria, 71 Ill. App. 3d 863, 28 Ill. Dec. 209, 390 N.E.2d 376 (1st Dist. 1979); Formica Const. Co., Inc. v. Mills, 9 Misc. 3d 398, 801 N.Y.S.2d 713, 58 U.C.C. Rep. Serv. 2d 605 (N.Y. City Civ. Ct. 2005).

A promissory note, issued by one cochairman of a corporation to the other, was supported by sufficient consideration where the note was clear, complete, unambiguous on its face, and recited that it was executed "for value." McCabe v. Green, 39 Misc. 3d 270, 961 N.Y.S.2d 841 (Sup 2013).

3 Gentile v. Bower, 222 Ga. App. 736, 477 S.E.2d 130 (1996).

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III. Consideration

B. What Constitutes Consideration

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West's Key Number Digest

West's Key Number Digest, Bills and Notes 92(1) to 95

A.L.R. Library

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B. What Constitutes Consideration

§ 122. Nature of consideration, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 92(1) to 95

A.L.R. Library

Validity and enforceability of contract in consideration of naming child, 21 A.L.R.2d 1061

Under the Uniform Commercial Code, the term "consideration" means any consideration sufficient to support a simple contract.[1] Thus, consideration sufficient to uphold an ordinary contract is sufficient to validate a negotiable instrument.[2]

The required consideration consists of some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other;[3] it is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him.[4] Thus, consideration for an instrument may consist of a benefit to the one party or a detriment to the other party.[5] The consideration need not move from the promisee[6] nor be pecuniary or beneficial to the promisor.[7] Rather, consideration may consist of a benefit to a third person,[8] or of an indirect benefit to the maker of a note.[9] Thus, a loan is sufficient consideration to support the obligation of a promissory note, regardless of whether the funds are advanced to the obligor or to a third person at the direction or request of the obligor.[10]

Observation:

Nothing is consideration that is not regarded as such by both parties.[11] In order for a detriment to the promisee to constitute a valid consideration for a note or contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them.[12]

While the most common consideration for a bill or note is money loaned,[13] or property or goods sold,[14] valuable consideration need not be one translatable into dollars and cents.[15]

Footnotes

1 U.C.C. § 3-303(b).
As to the general principles concerning what constitutes consideration for a contract, see Am. Jur. 2d, Contracts §§ 113 to 167.

2 Palmetto Leasing Co. v. Chiles, 235 Ill. App. 3d 986, 176 Ill. Dec. 770, 602 N.E.2d 77, 19 U.C.C. Rep. Serv. 2d 487 (2d Dist. 1992).

3 DCM Ltd. Partnership v. Wang, 555 F. Supp. 2d 808 (E.D. Mich. 2008).

4 ABR Wholesalers, Inc. v. King, 172 A.D.3d 1929, 99 N.Y.S.3d 846 (4th Dep't 2019).

5 In re White, 591 B.R. 884 (Bankr. D. Utah 2018), order aff'd, 2019 WL 3288952 (D. Utah 2019) (under Missouri law); Brown v. Mustion, 884 S.W.2d 365, 27 U.C.C. Rep. Serv. 2d 485 (Mo. Ct. App. S.D. 1994); Leach v. Treber, 164 Neb. 419, 82 N.W.2d 544 (1957); ABR Wholesalers, Inc. v. King, 172 A.D.3d 1929, 99 N.Y.S.3d 846 (4th Dep't 2019); City Trust & Sav. Bank v. Schwartz, 68 Ohio App. 80, 22 Ohio Op. 176, 39 N.E.2d 548 (7th Dist. Mahoning County 1940).

6 Flores v. Woodspecialties, Inc., 138 Cal. App. 2d 763, 292 P.2d 626 (2d Dist. 1956); In re Pascal's Estate, 3 Misc. 2d 136, 146 N.Y.S.2d 364 (Sup 1955).
It is not necessary that consideration flow directly from the payee to the makers of the note in order to bind the makers, so long as they do receive some benefit under the note. Jackson v. Luellen Farms, Inc., 877 N.E.2d 848, 64 U.C.C. Rep. Serv. 2d 639 (Ind. Ct. App. 2007).

7 Kelley, Glover & Vale v. Heitman, 220 Ind. 625, 44 N.E.2d 981 (1942); County Trust Co. of New York v. Mara, 242 A.D. 206, 273 N.Y.S. 597 (1st Dep't 1934), aff'd, 266 N.Y. 540, 195 N.E. 190 (1935).

8 Fentress v. Triple Min., Inc., 261 Ill. App. 3d 930, 200 Ill. Dec. 1, 635 N.E.2d 102 (4th Dist. 1994); Benderson Development Co., Inc. v. Hallaway Properties, Inc., 115 A.D.2d 339, 495 N.Y.S.2d 820 (4th Dep't 1985), order aff'd, 67 N.Y.2d 963, 502 N.Y.S.2d 1001, 494 N.E.2d 106 (1986).
Signer's stated intention to assist the cosigner of a promissory note was sufficient consideration to support the signer's liability on the note, even though the signer was not an owner or member of the limited liability companies (LLC) that were the borrowers. Walker v. Probandt, 25 Neb. App. 30, 902 N.W.2d 468, 93 U.C.C. Rep. Serv. 2d 838 (2017), review denied, (May 8, 2018) and cert. denied, 139 S. Ct. 333, 202 L. Ed. 2d 223 (2018).
The "consideration" underlying a promissory note was the benefit that the note maker received in helping his son purchase restaurant equipment, regardless of whether or not the consideration supporting the note

flowed from the lender to the note maker in the form of loan proceeds. Sullo Investments, LLC v. Moreau, 151 Conn. App. 372, 95 A.3d 1144 (2014).

9 Fentress v. Triple Min., Inc., 261 Ill. App. 3d 930, 200 Ill. Dec. 1, 635 N.E.2d 102 (4th Dist. 1994).

Promissory notes were not void for lack of consideration, even if the payor received no payment in exchange for making the notes, where the notes were used as substitute collateral for old loans or security for new loans, the proceeds of which were used to pay off debt secured by assets of the payee's sister company purchased by the payor's sister company; the notes enabled a transfer of clean title. Tissue Technology LLC v. Tak Investments LLC, 320 F. Supp. 3d 993, 95 U.C.C. Rep. Serv. 2d 418 (E.D. Wis. 2018), aff'd, 907 F.3d 1001, 97 U.C.C. Rep. Serv. 2d 80 (7th Cir. 2018) (under Wisconsin law).

10 Foreclosure of Deed of Trust of Blue Ridge Holdings Ltd. Partnership, 129 N.C. App. 534, 500 S.E.2d 446 (1998).

11 Stern v. Franks, 35 Cal. App. 2d 676, 96 P.2d 802 (4th Dist. 1939); Dougherty v. Salt, 227 N.Y. 200, 125 N.E. 94 (1919); First Nat. Bank v. Chandler, 58 S.W.2d 1056 (Tex. Civ. App. Fort Worth 1933), writ granted.

12 Metropolitan Property and Cas. Ins. Co. v. Westport Ins. Corp., 131 F. Supp. 3d 888 (D. Neb. 2015) (under Nebraska law).

13 Farmers' & Merchants' State Bank of Pender v. Kuhn, 125 Neb. 457, 250 N.W. 652 (1933); Cohen v. Warren, 238 A.D. 841, 262 N.Y.S. 711 (2d Dep't 1933).

The written promise of a person to pay a specific sum of money to another, signed by the promisor, itself imports consideration. Gibson v. Harl, 857 S.W.2d 260 (Mo. Ct. App. W.D. 1993).

A landlord was required under a promissory note with the tenant to pay the tenant's estate $100,000; the tenant advanced funds to the landlord for which the note was executed, and in consideration for the funds, the parties executed the note. Kryder v. Estate of Rogers, 296 F. Supp. 3d 892, 99 Fed. R. Serv. 3d 318 (M.D. Tenn. 2017), appeal dismissed, 2018 WL 4621512 (6th Cir. 2018) (under Tennessee law).

A loan from the payee on a promissory note to the makers was valid consideration for the note, where the makers signed the note to secure a new debt. Merchants Bank v. Head, 161 So. 3d 1151 (Ala. 2014).

14 Bulger v. Colonial House of Flushing, 281 A.D. 847, 119 N.Y.S.2d 233 (2d Dep't 1953).

There was adequate consideration for a promissory note regarding the sale of a grocery store where the vendors, as the promisees in the note, had given up possession of the grocery store, as well as the opportunity to sell it to other purchasers. Theobald v. Nosser, 752 So. 2d 1036 (Miss. 1999).

15 Schuelke v. Wilson, 255 Neb. 726, 587 N.W.2d 369 (1998).

Promissory notes given by a tenant to a landlord were supported by consideration, where the parties' lease clearly provided that the notes were given by the tenant as an inducement for the landlord to enter into the lease. Dabriel, Inc. v. First Paradise Theaters Corp., 99 A.D.3d 517, 952 N.Y.S.2d 506 (1st Dep't 2012).

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III. Consideration

B. What Constitutes Consideration

§ 123. Consideration as encompassing instruments issued for value

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 92(1)

A.L.R. Library

When is instrument issued or transferred for "value" under U.C.C. s 3-303, 77 A.L.R.5th 429

Although Article 3 of the Uniform Commercial Code distinguishes between "consideration" and "value,"[1] if an instrument is issued for value, the instrument is also issued for consideration.[2] Thus, if a promissory note is issued for value, consideration exists.[3]

For purposes of Article 3, an instrument is issued for value if:[4]

(1) the instrument is issued for a promise of performance, to the extent the promise has been performed;[5]

(2) the transferee acquires a security interest or other lien in the instrument other than a lien obtained by judicial proceeding;[6]

(3) the instrument is issued or transferred as payment of, or as security for, an antecedent claim against any person, whether or not the claim is due;[7]

(4) the instrument is issued or transferred in exchange for a negotiable instrument;[8] or

(5) the instrument is issued or transferred in exchange for the incurring of an irrevocable obligation to a third party by the person taking the instrument.[9]

Practice Tip:

Once an admission is made that an instrument is issued for value, the instrument is also issued for consideration, and one cannot assert a defense of lack of consideration to an attempt to enforce the instrument, even if the maker received no benefit or promise in exchange for the instrument.[10]

Footnotes

1 § 119.

2 U.C.C. § 3-303(b), referring to U.C.C. § 3-303(a).

3 Suttles v. Thomas Bearden Co., 152 S.W.3d 607 (Tex. App. Houston 1st Dist. 2004).

4 U.C.C. § 3-303(a).
Transfer for value, see § 178.
Issuance of instrument, generally, see §§ 155 to 159.

5 U.C.C. § 3-303(a)(1).

6 U.C.C. § 3-303(a)(2).

7 U.C.C. § 3-303(a)(3).

8 U.C.C. § 3-303(a)(4).

9 U.C.C. § 3-303(a)(5).

10 Noble v. Baker, 892 So. 2d 936, 53 U.C.C. Rep. Serv. 2d 552 (Ala. Civ. App. 2004).

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B. What Constitutes Consideration

§ 124. Past consideration

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 92(1)

As a general rule, past consideration is not consideration for a bill or note under circumstances not creating liability.[1]

Footnotes

1 Gooch v. Gooch, 178 Iowa 902, 160 N.W. 333 (1916).

11 Am. Jur. 2d Bills and Notes § 125

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B. What Constitutes Consideration

§ 125. Antecedent obligation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 92(1), 94(1) to 94(3)

No consideration generally is necessary for an instrument or obligation thereon given in payment of or as security for an antecedent obligation of any kind.[1] Thus, a promissory note provided to evidence an antecedent obligation does not need to be supported by consideration independent of that which was previously furnished for the loan.[2]

Under Article 3 of the Uniform Commercial Code an instrument is issued or transferred for value if, the instrument is issued or transferred as payment of, or as security for, an antecedent claim against any person, whether or not the claim is due.[3] In particular, this provision is intended to apply to an instrument given in payment of or as security for the debt of a third person, even though no concession is made in return.[4]

Under Article 3, therefore, a note which is given to consolidate several prior loans or obligations is supported by sufficient consideration.[5] Consequently, where a person executes a note to a bank renewing earlier notes which were given to extinguish a prior indebtedness to the bank, such person cannot avoid liability on the renewal note on the ground that there was no consideration.[6] In different circumstances, sufficient consideration existed to support restated notes that a debtor signed after the statute of limitations had run on a claim on the debtor's original promissory note, in the form of antecedent debt owed on the original note.[7]

Footnotes

1 Gouldstone v. Life Investors Ins. Co. of America, 236 Ga. App. 813, 514 S.E.2d 54 (1999); Guenin v. Benson, 1999 Mass. App. Div. 94, 1999 WL 788624 (1999), aff'd, 51 Mass. App. Ct. 1105, 744 N.E.2d 684 (2001); Formica Const. Co., Inc. v. Mills, 9 Misc. 3d 398, 801 N.Y.S.2d 713, 58 U.C.C. Rep. Serv. 2d 605 (N.Y. City Civ. Ct. 2005).

2 Sun Forest Corp. v. Shvili, 152 F. Supp. 2d 367, 44 U.C.C. Rep. Serv. 2d 973 (S.D. N.Y. 2001) (applying New York law).

3 § 123.

Sufficient consideration existed for a promissory note that a brother gave a sister, where the sister was owed an antecedent debt based on her prior investment in the brother's limited liability company (LLC), the investment and debt was rolled into the new venture personally guaranteed by the brother, and the brother received a personal benefit from the investment as the manager and majority owner of the LLC. Dugan v. Vlcko, 307 F. Supp. 3d 684, 95 U.C.C. Rep. Serv. 2d 623 (E.D. Mich. 2018) (under Michigan law).

A promissory note in which a defendant agreed to repay the plaintiff the money he invested in a real estate project was supported by consideration; the consideration was the money the plaintiff provided to the defendant in connection with the project, the promissory note represented security for the defendant's antecedent obligation to repay such funds, and the note itself, which was drafted by the defendant, signed by the defendant, notarized, and transmitted to the plaintiff clearly stated it was executed in return for the loan received by the defendant. Mills v. Chauvin, 103 A.D.3d 1041, 962 N.Y.S.2d 412, 79 U.C.C. Rep. Serv. 2d 758 (3d Dep't 2013).

4 Official Comment 4 to U.C.C. § 3-303.

5 Farmers State Bank of Victor v. Johnson, 188 Mont. 55, 610 P.2d 1172 (1980); Utah Bank & Trust v. Quinn, 622 P.2d 793, 31 U.C.C. Rep. Serv. 389 (Utah 1980).

A promissory note reflected the cumulative amount of preexisting loans between the lender and borrower, and thus was supported by valid consideration. Cohan v. Movtady, 751 F. Supp. 2d 436 (E.D. N.Y. 2010) (under New York law).

6 First Nat. Bank of Jackson v. Carver, 375 So. 2d 1198, 27 U.C.C. Rep. Serv. 1039 (Miss. 1979).

7 In re Eddy, 572 B.R. 774 (Bankr. M.D. Fla. 2017) (under Florida law).

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III. Consideration

B. What Constitutes Consideration

§ 126. Promise to perform acts in future

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 92(1)

As a general rule, an executory contract[1] or promise to perform in the future constitutes sufficient consideration for commercial paper.[2] Thus, where the consideration for a promissory note is the promise on the part of the payee to perform an executory contract made between the maker and the payee concurrently in point of time with the execution and delivery of the note, such promise is sufficient consideration for the note.[3]

Observation:

Under the Uniform Commercial Code, a promise to perform services in the future is consideration for the issuance of a check or note.[4]

Footnotes

1 In re Oody, 249 B.R. 482 (Bankr. E.D. Tenn. 2000); Whitehall Realty Corp. v. Manufacturers Trust Co., 100 So. 2d 617 (Fla. 1958); First Nat. Bank v. Hauss, 214 A.D. 689, 213 N.Y.S. 198 (4th Dep't 1925).

2 In re MJK Clearing, Inc., 408 F.3d 512 (8th Cir. 2005); Jones v. Green, 173 Ark. 846, 293 S.W. 749 (1927); Tradesmen's Nat. Bank v. Curtis, 167 N.Y. 194, 60 N.E. 429 (1901); Motor Finance Corp. v. Huntsberger, 116 Ohio St. 317, 5 Ohio L. Abs. 201, 156 N.E. 111 (1927).

3 Harper v. Bronson, 104 Fla. 75, 139 So. 203 (1932); Motor Finance Corp. v. Huntsberger, 116 Ohio St. 317, 5 Ohio L. Abs. 201, 156 N.E. 111 (1927).

4 Official Comment 1 to U.C.C. § 3-303, see Case #2.

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B. What Constitutes Consideration

§ 127. Personal services

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 92(1), 92(7)

Forms

Forms relating to personal services or services rendered, see Am. Jur. Legal Forms 2d, Uniform Commercial Code [Westlaw®(r) Search Query]

As a general rule, personal services rendered under an express or implied agreement to pay for them constitute sufficient consideration for a bill or note,[1] even where services are rendered under an agreement to a relative or family member.[2] Services by a person in close blood relationship to the person to whom the services are rendered, however, do not constitute consideration, unless it is shown that the services were rendered under such circumstances as would evince an intention to pay at the time the services were rendered.[3] A similar principle applies to services rendered to a friend or neighbor.[4]

Footnotes

1 In re Hore's Estate, 220 Minn. 374, 19 N.W.2d 783, 161 A.L.R. 1366 (1945); Miller v. Simoni, 4 U.C.C. Rep. Serv. 1171 (N.Y. Sup 1968).

2 In re Andrews' Estate, 245 Iowa 819, 64 N.W.2d 261 (1954).
Consideration and family relationships, generally, see § 129.

3 Florida Nat. Bank & Trust Co. of Miami v. Brown, 47 So. 2d 748 (Fla. 1949).

4 Page v. Provident Sav. Bank & Trust Co., 98 Ohio App. 410, 57 Ohio Op. 448, 130 N.E.2d 97 (1st Dist. Hamilton County 1954).

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III. Consideration

B. What Constitutes Consideration

§ 128. Moral obligation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 92(1)

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Moral or Natural Obligation as Consideration for Contract, 98 A.L.R.5th 353

A mere moral obligation, unconnected with any legal or equitable obligation, does not constitute sufficient consideration for a bill or note.[1] Thus, a moral obligation based on honor and dignity is not consideration.[2] Where the payees, however, in return for the payor's promise to pay an amount owed under a financing agreement, agree to assume and discharge the payor's indebtedness to a third party for which they are not obligated, the note executed by the payor is supported by sufficient consideration and not solely by the payor's moral obligation to pay.[3]

If a debt has been extinguished by the voluntary act of the creditor, a note for the debt or accrued interest on the debt is not supported by a moral consideration.[4] On the other hand, a moral obligation arising from what was once a legal liability, which has become suspended or barred by the operation of a positive rule of law, will furnish consideration for a subsequent executory promise embraced in full in a bill or note,[5] as where a debt is discharged in bankruptcy.[6] The receipt of material or pecuniary benefits, or services by the promisor may give rise to a moral obligation which will also support a subsequently executed bill or note, even though there was no antecedent legal liability,[7] unless such services were intended to be gratuitous and were rendered without any expectation of remuneration.[8] A moral duty also may amount to a natural obligation and serve as consideration

for a promissory note.[9] In order for a moral duty to rise to the level of a natural obligation which can serve as consideration for a promissory note, the moral duty must be felt towards a particular person, not all persons in general, the person involved must feel so strongly about the moral duty that he or she truly feels he or she owes a debt, the duty must be fulfillable through rendering a performance whose object is of pecuniary value, a recognition of the obligation by the obligor must occur, either by performing the obligation or promising to perform, and the fulfillment of the moral duty must not impair the public order.[10]

Footnotes

1 Sellers v. Citizens & Southern Nat. Bank, 177 Ga. App. 85, 338 S.E.2d 480 (1985); Meginnes v. McChesney, 179 Iowa 563, 160 N.W. 50 (1916); Griffin v. Louisville Trust Co., 312 Ky. 145, 226 S.W.2d 786 (1950).

2 Meginnes v. McChesney, 179 Iowa 563, 160 N.W. 50 (1916).

3 Alexander v. Delacruz, 545 P.2d 518 (Utah 1976).

4 Fender v. McCain, 144 Neb. 58, 12 N.W.2d 541 (1943).

5 Born v. La Fayette Auto Co., 196 Ind. 399, 145 N.E. 833, 41 A.L.R. 952 (1924).

6 Silva v. Robinson, 115 Fla. 830, 156 So. 280 (1934).

7 In re Bradbury, 105 A.D. 250, 93 N.Y.S. 418 (3d Dep't 1905).

8 Florida Nat. Bank & Trust Co. of Miami v. Brown, 47 So. 2d 748 (Fla. 1949).

9 Azaretta v. Manalla, 768 So. 2d 179, 98 A.L.R.5th 747 (La. Ct. App. 5th Cir. 2000).

10 Azaretta v. Manalla, 768 So. 2d 179, 98 A.L.R.5th 747 (La. Ct. App. 5th Cir. 2000).

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III. Consideration

B. What Constitutes Consideration

§ 129. Love and affection; family relationship

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 92(1), 92(7)

Love and affection alone,[1] or a family relationship, is not sufficient consideration to support or create an obligation to pay a bill or note.[2]

The fact that an instrument is executed for past services or support provided to a relative by a third person does not establish sufficient consideration for the instrument.[3]

Footnotes

1 Sullivan v. Sullivan, 122 Ky. 707, 29 Ky. L. Rptr. 239, 92 S.W. 966 (1906); In re Simmons' Estate, 48 Misc. 484, 96 N.Y.S. 1103 (Sur. Ct. 1905); Production Credit Ass'n of Mandan v. Rub, 475 N.W.2d 532 (N.D. 1991).
Love, affection, and moral support that a wrongfully incarcerated prisoner received from family members during his incarceration did not constitute legally sufficient consideration for his promise to pay $1 million of the $15 million judgment that he obtained based on his incarceration upon his collection thereof. In re White, 591 B.R. 884 (Bankr. D. Utah 2018), order aff'd, 2019 WL 3288952 (D. Utah 2019) (under Missouri law).

2 Sullivan v. Sullivan, 122 Ky. 707, 29 Ky. L. Rptr. 239, 92 S.W. 966 (1906); Dougherty v. Salt, 227 N.Y. 200, 125 N.E. 94 (1919); Hoodlett v. Hoodlett, 12 Ohio L. Abs. 577, 1932 WL 1753 (Ct. App. 4th Dist. Athens County 1932).

3 In re Dashnau's Estate, 194 Misc. 156, 88 N.Y.S.2d 13 (Sur. Ct. 1948); Peters v. Poro's Estate, 96 Vt. 95, 117 A. 244, 25 A.L.R. 615 (1922).

Personal services, generally, see § 127.

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B. What Constitutes Consideration

§ 130. Extension of time

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 92(1)

An extension of time for the payment of an existing legal obligation constitutes sufficient consideration for an undertaking on commercial paper,[1] whether the undertaking is by the one owing the original obligation[2] or by a third person,[3] since in either case the giving of the extension of time is at least a disadvantage to the promisee if it is not an advantage to the promisor.[4] The giving of an extension of time within which to pay a void note, however, does not constitute consideration for a renewed promise to pay the note, since there is neither an advantage gained by the maker nor a detriment suffered by the payee.[5]

Observation:

Some jurisdictions take the position that the application of the general rule as to an extension of time depends upon the facts of the case, and that the extension of time must be given upon the indebtedness which is assumed by the giving of the note, in order to constitute a consideration for it.[6]

Footnotes

1 In re MJK Clearing, Inc., 408 F.3d 512 (8th Cir. 2005); Schaefer v. First Nat. Bank, 134 Ohio St. 511, 13 Ohio Op. 129, 18 N.E.2d 263 (1938); Perry v. Riske, 2 Wis. 2d 377, 86 N.W.2d 429 (1957).
Extension of the maturity date of three short-term notes pursuant to a promissory note that consolidated the short-term notes constituted adequate consideration for the new note. Lissiak v. SW Loan OO, L.P., 499 S.W.3d 481 (Tex. App. Tyler 2016).

2 First State Bank v. Williams, 143 Iowa 177, 121 N.W. 702 (1909); Farmers' & Merchants' State Bank of Pender v. Kuhn, 125 Neb. 457, 250 N.W. 652 (1933); Traill County v. Moackrud, 65 N.D. 615, 260 N.W. 821 (1935).

3 First Nat. Bank v. Bristol, 35 S.W.2d 999 (Mo. Ct. App. 1931); Farmers' & Merchants' State Bank of Pender v. Kuhn, 125 Neb. 457, 250 N.W. 652 (1933).

4 Farmers' & Merchants' State Bank of Pender v. Kuhn, 125 Neb. 457, 250 N.W. 652 (1933); Southern Frozen Foods, Inc. v. Hill, 241 S.C. 524, 129 S.E.2d 420 (1963).

5 Pacific Rys. Advertising Co. v. Carr, 29 Cal. App. 722, 157 P. 529 (2d Dist. 1916).

6 Schaefer v. First Nat. Bank, 134 Ohio St. 511, 13 Ohio Op. 129, 18 N.E.2d 263 (1938).

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III. Consideration

B. What Constitutes Consideration

§ 131. Forbearance

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 92(3)

A forbearance to sue,[1] or to collect a debt when due,[2] or to assert a right or claim,[3] either legal or equitable,[4] constitutes sufficient consideration for an undertaking on commercial paper, even though the promise is made by a third person who is a stranger to the original obligation.[5] Also, the discharge, release or forbearance of a right or claim against a third person, at the instance or request of the obligor, is sufficient consideration to support the latter's undertaking on a promissory note.[6]

Although there is some authority to the contrary,[7] it is generally recognized that there must be a prior agreement to forbear in order for a forbearance to constitute valid consideration.[8] The agreement to forbear may be implied from the circumstances.[9]

Forbearance to press a claimed right, wholly without legal foundation, furnishes no consideration for a new promise.[10] Thus, where the payee does not have any claim against the maker of the note and does not honestly believe that he or she has a valid claim, a note given to obtain forbearance is not supported by consideration.[11] However, forbearance of a justiciable claim, even if valid defenses existed as to the claim, is consideration sufficient to support a promissory note.[12]

Observation:

A second promissory note executed by a debtor in exchange for the lender's promise not to proceed to enforce the first promissory note is independently enforceable according to its own terms, where the lender agreed to forbearance only if the lender could enforce both notes in the event of default on the second note.[13]

Footnotes

1 Acme Inv. Corp. v. Thompson, 216 Cal. 335, 14 P.2d 87 (1932); Lea v. Suhl, 417 So. 2d 1179 (Fla. 2d DCA 1982); Leef v. Steele, 81 A.D.2d 764, 439 N.Y.S.2d 113 (1st Dep't 1981).
When final settlement was not made on a check due to the discovery that the check was counterfeit, the collecting bank's forbearance of a legal action against the customer was sufficient to constitute consideration for his wife's transfer of assets to, and execution of a promissory note in favor of, the bank. Call v. Ellenville Nat. Bank, 5 A.D.3d 521, 774 N.Y.S.2d 76, 53 U.C.C. Rep. Serv. 2d 92 (2d Dep't 2004).
An agricultural cooperative's forbearance of suit constituted sufficient consideration to support the validity of a promissory note with a member, where the cooperative accepted the promissory note in forbearance of its rights to collect the amount due, owing, and unpaid on member's account. Harvest Land Co-Op, Inc. v. Hora, 2012-Ohio-5915, 2012 WL 6554728 (Ohio Ct. App. 2d Dist. Montgomery County 2012).

2 Sun Forest Corp. v. Shvili, 152 F. Supp. 2d 367, 44 U.C.C. Rep. Serv. 2d 973 (S.D. N.Y. 2001) (applying New York law).
Forbearance from collecting on a debt is consideration for a new note and guaranty. Graphic Prep, Inc. v. Graphcom, Inc., 206 Ga. App. 689, 426 S.E.2d 183 (1992).

3 Brown v. Mustion, 884 S.W.2d 365, 27 U.C.C. Rep. Serv. 2d 485 (Mo. Ct. App. S.D. 1994).
The consideration that is required to be given to the maker of a note may consist of some forbearance by the other party. DCM Ltd. Partnership v. Wang, 555 F. Supp. 2d 808 (E.D. Mich. 2008).

4 Jamaica Tobacco & Sales Corp. v. Ortner, 70 Misc. 2d 388, 333 N.Y.S.2d 669, 11 U.C.C. Rep. Serv. 100 (N.Y. City Civ. Ct. 1972).

5 Adolph Ramish, Inc. v. Woodruff, 2 Cal. 2d 190, 40 P.2d 509, 96 A.L.R. 1146 (1934); Farmers' & Merchants' State Bank of Pender v. Kuhn, 125 Neb. 457, 250 N.W. 652 (1933).

6 In re White, 591 B.R. 884 (Bankr. D. Utah 2018), order aff'd, 2019 WL 3288952 (D. Utah 2019) (under Missouri law).

7 In re Taylor's Estate, 236 A.D. 571, 260 N.Y.S. 836 (3d Dep't 1932), aff'd, 262 N.Y. 688, 188 N.E. 122 (1933).

8 Parrino v. Rallis, 116 Cal. App. 364, 2 P.2d 515 (1st Dist. 1931).
The forbearance of a lawsuit by a noteholder did not constitute valid consideration for a promissory note where no forbearance agreement was executed. L.A. West v. East Town and Country Drainage Dist., 698 So. 2d 1033 (La. Ct. App. 2d Cir. 1997), writ denied, 704 So. 2d 1194 (La. 1997).

9 Bank of America N.T. & S.A. v. Hollywood Imp. Co., 46 Cal. App. 2d 817, 117 P.2d 13 (4th Dist. 1941); Saunders v. Bank of Mecklenburg, 112 Va. 443, 71 S.E. 714 (1911).

10 Hooff v. Paine, 172 Va. 481, 2 S.E.2d 313 (1939).
A lender's alleged agreement to forbear from suing a borrower for failing to repay a loan was insufficient consideration for his promises to pay the sums allegedly due under the usurious demand note, and thus the note was unenforceable, since the lender could not sustain the claim against the borrower for failure to pay the usurious loan. Venables v. Sagona, 85 A.D.3d 904, 925 N.Y.S.2d 578 (2d Dep't 2011).

11 Matey v. Pruitt, 510 So. 2d 351 (Fla. 2d DCA 1987).

12 Simrall v. Bunge-Ergon Vicksburg LLC, 179 So. 3d 92, 88 U.C.C. Rep. Serv. 2d 282 (Miss. Ct. App. 2015).

13 Hamm v. Scott, 258 Va. 35, 515 S.E.2d 773 (1999).

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III. Consideration

B. What Constitutes Consideration

§ 132. Release or waiver of right; compromise of claim

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 92(2)

The relinquishment by the promisee of some right which he or she may lawfully exercise or enforce,[1] or his or her waiver of any legal right,[2] such as a waiver of the right to insist on immediate payment, constitutes sufficient consideration to support a bill or note.[3] Under this rule, sufficient consideration exists where—

— a promise is made to forbear putting the makers' company out of business by canceling insurance policies.[4]

— the promisee cancels the indebtedness of a third person and surrenders to such third person the paper evidencing such indebtedness.[5]

— the promisee reduces the amount owed on a debt balance in a margin loan account.[6]

— a note is given in exchange for the promisee giving up his or her right to trial by settling litigation with a third party.[7]

— a note is given in exchange for a release of a lien on real property.[8]

— a note is given to settle a disputed claim,[9] or to extinguish a claim even if the promisee is no longer able to collect on the underlying claim that gave rise to the note.[10]

Surrender of a claim against an insolvent constitutes consideration for a bill or note given by a third person.[11] Where, however, the insolvent is dead and leaves no property liable to process, a note by a widow, heir, or other person is generally recognized as being without consideration.[12] Additionally, a mother's purported agreement to rescind her request to be named on the deed

to a son's home did not constitute "valuable consideration" for a promissory note in which the son promised to pay the mother a specified sum, where the note specifically purported to establish that the consideration was the money the mother gave the son for the down payment and termite repairs.[13]

Footnotes

1 City Trust & Sav. Bank v. Schwartz, 68 Ohio App. 80, 22 Ohio Op. 176, 39 N.E.2d 548 (7th Dist. Mahoning County 1940).

2 Bumgardner v. Groover, 245 N.C. 17, 95 S.E.2d 101 (1956).

3 Formica Const. Co., Inc. v. Mills, 9 Misc. 3d 398, 801 N.Y.S.2d 713, 58 U.C.C. Rep. Serv. 2d 605 (N.Y. City Civ. Ct. 2005).

4 Green Apple Management Corp. v. Aronis, 95 A.D.3d 826, 943 N.Y.S.2d 221 (2d Dep't 2012).

5 City Trust & Sav. Bank v. Schwartz, 68 Ohio App. 80, 22 Ohio Op. 176, 39 N.E.2d 548 (7th Dist. Mahoning County 1940).

The discharge of a preexisting debt owed by a third party is legal consideration for a promissory note. Barclays Bank PLC v. Skulsky Trust, 287 A.D.2d 365, 731 N.Y.S.2d 443 (1st Dep't 2001).

6 In re MJK Clearing, Inc., 408 F.3d 512 (8th Cir. 2005).

7 Anand v. Wilson, 32 A.D.3d 808, 821 N.Y.S.2d 130 (2d Dep't 2006).

8 Sam Stockton Grading Co., Inc. v. Hall, 111 N.C. App. 630, 433 S.E.2d 7 (1993).

A building owner who gave a note to an improver of the building, thereby paying the debt and securing a release of the latter's lien on the building, received consideration for his note. Polo Corp. v. Medco Management Corp., 377 So. 2d 484, 27 U.C.C. Rep. Serv. 1340 (La. Ct. App. 4th Cir. 1979), writ denied, 380 So. 2d 101 (La. 1980).

9 Mitchell v. Mitchell, 191 Ga. App. 139, 381 S.E.2d 84 (1989).

A promissory note signed by a promoter in settlement of an investor's claims for fraud, misrepresentation, and the return of her investment was supported by consideration, since the promoter benefitted by not having to account for the disappearance of the investor's money and by not having to provide a full refund. Hayes v. Alexander, 264 Ga. App. 815, 592 S.E.2d 465 (2003).

The surrender of a claim under a land sales contract was consideration for a promissory note given in return for the release, even though the claim may in fact have been worthless. Todd v. Berner, 214 Mont. 263, 693 P.2d 506 (1984).

There was sufficient consideration for the defendant wife's execution of a note and deed of trust to the plaintiff where the evidence showed that, pursuant to the settlement of an action by the plaintiff against the defendant husband to recover an amount due under an agreement dissolving a business partnership, the defendants executed the note and deed of trust to the plaintiff in exchange for the plaintiff's voluntary dismissal of the action. Deal v. Christenbury, 50 N.C. App. 600, 274 S.E.2d 867 (1981).

10 Aragon v. Chapman, 967 So. 2d 597 (La. Ct. App. 3d Cir. 2007).

11 Home State Bank v. De Witt, 121 Kan. 29, 245 P. 1036 (1926).

12 Bank of Commerce of Louisville v. McCarty, 119 Neb. 795, 231 N.W. 34 (1930).

13 Lewis v. Ikner, 349 Ga. App. 21, 825 S.E.2d 443 (2019).

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III. Consideration

B. What Constitutes Consideration

§ 133. Exchange of paper

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 95

Under the Uniform Commercial Code, an instrument is issued or transferred for value if the instrument is issued or transferred in exchange for a negotiable instrument.[1] If, however, the exchanged paper is absolutely void and worthless, and there is no basis for a legal claim or a belief in the existence of such a claim, there is no consideration for the exchanged paper.[2]

Observation:

It has generally been recognized that where a cross-note, bill, or check is given for the mutual accommodation of the parties, or of one of them, in which the maker and the payee of one note are, respectively, the payee and maker of the other note, the paper thus exchanged constitutes business paper, with the one instrument being a good consideration for the other received in exchange, provided that there is no restriction on use or negotiation of the paper.[3] Whether there is an exchange of paper so as to constitute one instrument the consideration for the other, or a mere accommodation with the accommodation party taking the accommodated party's note merely by way of indemnity, depends upon the intent of the parties;[4] however, a rebuttable presumption of exchange and mutual consideration arises from similarity of date, amount, and terms of the respective instruments.[5]

Footnotes

1 § 123.

2 Fairfield County Nat. Bank v. Hammer, 89 Conn. 592, 95 A. 31 (1915).

3 Hederman v. Cox, 188 Miss. 21, 193 So. 19 (1940); Artia Parliament Distributing Corp. v. Kendricks, 19 A.D.2d 813, 243 N.Y.S.2d 493 (1st Dep't 1963); First Nat. Bank v. Rodgers, 1928 OK 228, 130 Okla. 146, 265 P. 1049 (1928).

4 Hederman v. Cox, 188 Miss. 21, 193 So. 19 (1940).

5 Mutual Loan Ass'n v. Brandt, 35 Misc. 270, 71 N.Y.S. 770 (App. Term 1901).

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C. Want or Failure of Consideration

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III. Consideration

C. Want or Failure of Consideration

1. In General

§ 134. Generally; effect of absence or failure of consideration

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 97(1) to 97(3)

Like any other contract, a negotiable instrument must be supported by a consideration.[1] Even a commercial paper which is nonnegotiable must be supported by a consideration.[2] Where no consideration exists or none was intended to pass, there is a want or absence of consideration.[3]

Under Article 3 of the Uniform Commercial Code, the drawer or maker of an instrument has a defense if the instrument is issued without consideration.[4] If an instrument is issued for a promise of performance, the issuer has a defense to the extent performance of the promise is due and the promise has not been performed.[5]

A party may defend against having to pay under a promissory note by arguing failure or want of consideration for the note.[6] Total absence or total failure of consideration goes to the entire validity of the instrument and avoids it, or discharges the promisor or excuses performance on his or her part.[7]

Footnotes

1 § 119.

2 Lull v. Brooks' Estate, 195 Misc. 175, 89 N.Y.S.2d 6 (Sur. Ct. 1949).

3 Hart v. Hart, 160 N.W.2d 438 (Iowa 1968).

4 U.C.C. § 3-303(b).

5 U.C.C. § 3-303(b).

6 Santomieri v. Mangen, 2018-Ohio-1443, 111 N.E.3d 483 (Ohio Ct. App. 3d Dist. Auglaize County 2018), appeal not allowed, 153 Ohio St. 3d 1462, 2018-Ohio-3258, 104 N.E.3d 792 (2018).

7 Kelley, Glover & Vale v. Heitman, 220 Ind. 625, 44 N.E.2d 981 (1942).

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C. Want or Failure of Consideration

1. In General

§ 135. Effect of seal

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 97(1)

Some authority holds that a note under seal creates a rebuttable presumption of consideration.[1] The presence of a seal on a promissory note, however, does not preclude the defense of lack of consideration, if the parties to the note intended that consideration would pass.[2]

Observation:

In modern times, most of the states have judicially modified or statutorily abolished the seal or the common-law distinction between sealed and unsealed instruments.[3]

Footnotes

1 Foreclosure of Deed of Trust of Blue Ridge Holdings Ltd. Partnership, 129 N.C. App. 534, 500 S.E.2d 446 (1998).

2 Venners v. Goldberg, 133 Md. App. 428, 758 A.2d 567, 42 U.C.C. Rep. Serv. 2d 1040 (2000).

3 Am. Jur. 2d, Seals § 2.

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C. Want or Failure of Consideration

1. In General

§ 136. Accommodation parties

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 96, 97(1)

Under Article 3 of the Uniform Commercial Code, if an instrument is issued for value given for the benefit of a party to the instrument ("accommodated party") and another party to the instrument ("accommodation party") signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party "for accommodation."[1] An accommodation party may sign the instrument as maker, drawer, acceptor, or indorser and, subject to law pertaining to a guaranteed of collection, is obliged to pay the instrument in the capacity in which the accommodation party signs.[2] The obligation of an accommodation party may be enforced notwithstanding any statute of frauds and whether or not the accommodation party receives consideration for the accommodation.[3] Thus, regardless of whether a surety signs gratuitously or receives compensation, his or her obligation is supported by consideration, which moves from the creditor to the principal debtor,[4] and even though such consideration was furnished prior to the signature of the accommodation party on the notes.[5]

Footnotes

1 U.C.C. § 3-419(a).

2 U.C.C. § 3-419(b), referring to U.C.C. § 3-419(d).

3 U.C.C. § 3-419(b).

4 In re Couchot, 169 B.R. 40, 23 U.C.C. Rep. Serv. 2d 1170 (Bankr. S.D. Ohio 1994).

5 St. Charles Nat. Bank v. Ford, 39 Ill. App. 3d 291, 349 N.E.2d 430, 19 U.C.C. Rep. Serv. 1178 (2d Dist. 1976).

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C. Want or Failure of Consideration

1. In General

§ 137. Promissory estoppel

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 98

Where the doctrine of promissory estoppel is applicable as a substitute or equivalent of consideration, a promise to pay money without consideration is enforceable where the promise has been relied on to the detriment of the promisee and such reliance is within the expectation of the maker.[1]

Footnotes

1 Smith v. Morgan, 214 Iowa 555, 240 N.W. 257 (1932).
As to promissory estoppel and whether it constitutes consideration for a contract, generally, see Am. Jur. 2d, Contracts § 108.
Even assuming that a borrower's partner received no consideration for three short-term notes executed by the borrower and the partners, by consolidating those notes into a single promissory note with an extended maturity date, the borrower was estopped from asserting that the short-term notes were unenforceable for failure of consideration. Lissiak v. SW Loan OO, L.P., 499 S.W.3d 481 (Tex. App. Tyler 2016).

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2. What Constitutes Want or Failure of Consideration

§ 138. Generally; distinction between want and failure

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 97(1) to 97(3)

Forms

Forms relating to failure of consideration, see Am. Jur. Pleading and Practice Forms, Bills and Notes [Westlaw®(r): Search Query]

Forms relating to failure of consideration, see Am. Jur. Pleading and Practice Forms, Commercial Code [Westlaw®(r) Search Query]

A distinction exists between the want of consideration and the failure of consideration, in that the want of consideration is a total lack of any valid consideration, while the failure of consideration, is the neglect, refusal, or failure of one of the parties to perform or furnish the consideration agreed upon.[1] A failure of consideration concedes that there was consideration for the instrument in its inception, but alleges that the consideration has wholly or partially ceased to exist, whereas a want of consideration asserts that consideration was not given for the note.[2] Thus, an allegation of failure of consideration in a promissory note implies that consideration, once existing and sufficient, has become worthless or ceases to exist, which distinguishes it from a lack of consideration.[3] If there is a want of consideration, a promise cannot be enforced, but where there is a failure of consideration, such failure operates as a defense.[4]

Practice Tip:

Where several promises are made by one party, the question of whether the breach of one such promise results in a complete or partial failure of consideration, or no failure at all, is determined under the doctrine of substantial performance.[5]

Footnotes

1 Holm v. Woodworth, 271 So. 2d 167, 11 U.C.C. Rep. Serv. 818 (Fla. 4th DCA 1972).
The failure of consideration consists of the failure to perform, carry out, or make good a promise given as consideration for an instrument. Bliss v. California Co-op. Producers, 30 Cal. 2d 240, 181 P.2d 369, 170 A.L.R. 1009 (1947); Henry v. Reich, 80 Ohio App. 185, 35 Ohio Op. 512, 48 Ohio L. Abs. 500, 72 N.E.2d 500 (2d Dist. Franklin County 1947).

2 Williamson v. Guice, 613 So. 2d 797 (La. Ct. App. 4th Cir. 1993), writ denied, 617 So. 2d 937 (La. 1993).

3 Mobley v. Baker, 72 S.W.3d 251 (Mo. Ct. App. W.D. 2002).
The defense of failure of consideration in an action on a promissory note presupposes that there was a consideration for the note in the first instance, but that it later failed. Bassett v. American Nat. Bank, 145 S.W.3d 692 (Tex. App. Fort Worth 2004).

4 Parker v. McGaha, 291 Ala. 339, 280 So. 2d 769 (1973).
The failure of consideration is an affirmative defense to a suit on a promissory note. Brown v. Mustion, 884 S.W.2d 365, 27 U.C.C. Rep. Serv. 2d 485 (Mo. Ct. App. S.D. 1994).

5 Sepo v. First Nat. Bank of Arizona, 21 Ariz. App. 606, 522 P.2d 562 (Div. 1 1974).

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2. What Constitutes Want or Failure of Consideration

§ 139. Inadequacy distinguished

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 97(1)

There is no failure of consideration when the consideration is merely inadequate, that is, when the party obtains everything that was bargained for but is disappointed as to the expected value of the consideration.[1] Thus, there is no failure of consideration when the consideration received for the instrument proves to have little or no value,[2] as long as there is no fraud, failure of title or warranty, or other legal failure of the consideration for the promise.[3]

Practice Tip:

Inadequacy of consideration is not a defense against a claim based on a note.[4]

Footnotes

1 FPI Development, Inc. v. Nakashima, 231 Cal. App. 3d 367, 282 Cal. Rptr. 508 (3d Dist. 1991); Burch v. Ashburn, 295 S.C. 274, 368 S.E.2d 82 (Ct. App. 1988).
Resale that yielded a buyer $65,000 for lamp parts he had purchased from a lamp business amounted to consideration to support a $250,000 promissory note he had signed to obtain the parts, even though he allegedly thought he was getting $500,000 worth of parts he might have to sell for $250,000. Holt v. Wilmoth, 336 S.W.3d 234 (Tenn. Ct. App. 2010).

2 Fagala v. Morrison, 146 Ga. App. 377, 246 S.E.2d 408 (1978); Galbraith v. McDonald, 123 Minn. 208, 143 N.W. 353 (1913).

3 Harshbarger v. Eby, 28 Idaho 753, 156 P. 619 (1916); Larson v. Lybyer, 312 Ill. App. 188, 38 N.E.2d 177 (3d Dist. 1941); In re Dashnau's Estate, 194 Misc. 156, 88 N.Y.S.2d 13 (Sur. Ct. 1948).

4 Rybak v. Dressler, 178 Ill. App. 3d 569, 127 Ill. Dec. 366, 532 N.E.2d 1375 (2d Dist. 1988).

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§ 140. Nondelivery of property purchased; failure of title; breach of warranty

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 97(1), 97(3)

A.L.R. Library

Validity, in contract for installment sale of consumer goods, or commercial paper given in connection therewith, of provision waiving, as against assignee, defenses good against seller, 39 A.L.R.3d 518

There is a failure of consideration for a purchase money obligation where the seller fails to deliver the property purchased or agreed to be purchased,[1] or where there is a want or failure of title which the seller agreed to transfer.[2] Thus, when the sale of a motor vehicle is void under local law because the seller does not deliver the title certificate, there is a failure of consideration for the note given by the buyer in payment.[3]

A breach of warranty on a sale constitutes a failure of consideration for the purchase money paper.[4]

Footnotes

1 Bamberg v. Griffin, 76 Ill. App. 3d 138, 31 Ill. Dec. 708, 394 N.E.2d 910, 27 U.C.C. Rep. Serv. 740 (2d Dist. 1979); Pennsylvania Rubber Co. v. Miller, 260 A.D. 485, 23 N.Y.S.2d 513 (1st Dep't 1940); Motor Finance Corp. v. Huntsberger, 116 Ohio St. 317, 5 Ohio L. Abs. 201, 156 N.E. 111 (1927).

2 Rubinger v. Rippey, 201 Misc. 135, 110 N.Y.S.2d 5 (App. Term 1951); Fiedler v. Bigelow, 25 Ohio App. 456, 5 Ohio L. Abs. 803, 159 N.E. 131 (8th Dist. Cuyahoga County 1926).

3 Robinson v. Densman, 470 S.W.2d 451 (Tex. Civ. App. El Paso 1971), writ refused n.r.e.

4 Marin v. Francisca Reyes, Inc., 263 N.Y. 550, 189 N.E. 692 (1933); Carius v. Ohio Contract Purchase Co., 30 Ohio App. 57, 164 N.E. 234 (8th Dist. Cuyahoga County 1928).

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2. What Constitutes Want or Failure of Consideration

§ 141. Loss or destruction of property after delivery

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 97(1), 97(3)

Under the view that the risk of loss or destruction of property sold under a title retention or conditional sales contract lies with the purchaser after delivery of the goods, unless otherwise provided by the contract, the occurrence of such a loss or destruction does not result in failure of consideration for a bill or note given for the purchase price.[1] Thus, there is no failure of consideration where there is a delivery of machinery to be installed and it is destroyed by fire before installation.[2]

Footnotes

1 American Soda Fountain Co. v. Vaughn, 69 N.J.L. 582, 55 A. 54 (N.J. Sup. Ct. 1903).

2 First Prize v. Fireman's Fund Ins. Co. of Cal., 269 S.W.2d 939 (Tex. Civ. App. Galveston 1954), writ refused n.r.e., (Oct. 20, 1954).

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2. What Constitutes Want or Failure of Consideration

§ 142. Rescission of contract

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 97(1)

Where a contract for the sale of property is accompanied by the vendee's check, note, or other separate obligation for the whole or a portion of the purchase price, and the vendor rescinds the contract, this termination of the contract destroys the consideration for the separate obligation of the vendee and it is no longer enforceable against him or her by the vendor or one not a holder in due course of a negotiable instrument.[1] If a check or other negotiable instrument, however, is given in lieu of a cash deposit as the first payment, the vendor, upon default by the vendee by his or her refusal to carry through the purchase, has the same right to enforce such instrument as he or she would have to retain a cash deposit for which it is a substitute.[2]

Footnotes

1 Gray v. Mitchell, 145 Or. 519, 28 P.2d 631 (1934); First Nat. Bank of Jasper, Minn. v. Larson, 53 S.D. 262, 220 N.W. 506, 68 A.L.R. 940 (1928).
As to what constitutes a holder in due course, see §§ 214 to 223.

2 Horton v. Hedberg, 143 Colo. 62, 351 P.2d 843 (1960); Coseboom v. Marshall Trust, 1960-NMSC-113, 67 N.M. 405, 356 P.2d 117 (1960); Schottenstein v. Devoe, 83 Ohio App. 193, 38 Ohio Op. 266, 52 Ohio L. Abs. 184, 82 N.E.2d 552 (1st Dist. Hamilton County 1948).

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2. What Constitutes Want or Failure of Consideration

§ 143. Retention of old instrument after execution of new

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 97(1)

If a note is executed in renewal of another,[1] or in consideration of forbearance to sue on another note,[2] the mere fact that the original note is retained and not surrendered or destroyed does not render the new note unenforceable, in the absence of an express agreement that the old note must be surrendered or destroyed; however, if a new note is given in consideration of the surrender of an old note and the old note is not surrendered on demand, there is a failure of consideration for the new note.[3]

Footnotes

1 Purcellville Nat. Bank v. Carter, 146 A.2d 206 (Mun. Ct. App. D.C. 1958).

2 Phenix Nat. Bank of Providence v. Raia, 68 R.I. 348, 28 A.2d 20, 141 A.L.R. 1474 (1942).
Forbearance, generally, see § 131.

3 Gansevoort Bank of City of New York v. Gilday, 53 Misc. 107, 104 N.Y.S. 271 (N.Y. City Ct. 1907); Phenix Nat. Bank of Providence v. Raia, 68 R.I. 348, 28 A.2d 20, 141 A.L.R. 1474 (1942).

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§ 144. Failure or impossibility of performance

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 97(1)

Where the consideration for a negotiable instrument consists of a promise by the payee to do or furnish something and he or she is unwilling or unable to do so, there is a failure of consideration.[1] Similarly, where a contract contemplates future performance as the consideration, and before the time comes for that consideration to pass, and before it has passed, unforeseen things occur which are not brought about by either party and which make it impossible for the contract to be performed, a total failure of consideration results.[2] Thus, the maker of a note is excused from paying the note where there has been a failure to furnish the consideration, even if such failure is due to impossibility for any reason.[3]

Footnotes

1 Henry v. Reich, 80 Ohio App. 185, 35 Ohio Op. 512, 48 Ohio L. Abs. 500, 72 N.E.2d 500 (2d Dist. Franklin County 1947).
An installment note, given to finance the membership fees in a business networking association, would be rescinded for failure of consideration, after the association rejected the maker's membership application. BNI New York, Ltd. v. DeSanto, 177 Misc. 2d 9, 675 N.Y.S.2d 752 (N.Y. City Ct. 1998).
When the maker executed a note in return for the payee's making a loan to the maker's son but the loan was never made, there is a failure of consideration and the note could not be enforced. Progressive State Bank & Trust Co., Inc. v. Stutts, 516 So. 2d 1207 (La. Ct. App. 2d Cir. 1987).

2 Bliss v. California Co-op. Producers, 30 Cal. 2d 240, 181 P.2d 369, 170 A.L.R. 1009 (1947); Wilson's Adm'r v. Nolen, 200 Ky. 609, 255 S.W. 267, 34 A.L.R. 80 (1923); In re Roy's Estate, 278 Mich. 6, 270 N.W. 196 (1936).

3 Wallinger v. Kelly, 136 Va. 547, 117 S.E. 850 (1923).

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D. Illegal Consideration

1. In General

§ 145. Effect, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 92(1)

Commercial paper is subject to the condemnation of agreements which are founded upon an illegal consideration[1] or grow out of an illegal transaction,[2] whether the illegality consists of a violation of a constitutional[3] or statutory[4] provision, public policy,[5] or good morals.[6]

Practice Tip:

Where parties are equally at fault in the violation of a law or a rule of public policy, the law will deny relief to either one seeking it; however, this is not the result where the one who took a note is not the wrongdoer, and the denial of relief would benefit the guilty body at the expense of the innocent.[7]

Footnotes

1 Ashley State Bank v. Hood, 47 Idaho 780, 279 P. 418 (1929); Dobbs v. Holder, 242 S.W.2d 605 (Ky. 1951); Messineo v. Kletz, 16 Misc. 2d 624, 185 N.Y.S.2d 397 (Sup 1959), order aff'd, 10 A.D.2d 734, 201 N.Y.S.2d 486 (2d Dep't 1960).

2 Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 86 A.2d 201 (1952); Messineo v. Kletz, 16 Misc. 2d 624, 185 N.Y.S.2d 397 (Sup 1959), order aff'd, 10 A.D.2d 734, 201 N.Y.S.2d 486 (2d Dep't 1960).

3 Weinberg v. Goldstein, 226 A.D. 479, 235 N.Y.S. 529 (4th Dep't 1929).

4 Ludwig v. Steger, 99 Cal. App. 235, 278 P. 494 (3d Dist. 1929); Beverage Co. v. Villa Marie Co., 69 S.D. 627, 13 N.W.2d 670 (1944).

5 Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 86 A.2d 201 (1952).
Public policy renders a promissory note founded upon an illegal consideration unenforceable. Minor v. McDaniel, 210 Ga. App. 146, 435 S.E.2d 508 (1993).

6 Board of Education of District of Northfork v. Angel, 75 W. Va. 747, 84 S.E. 747 (1915).

7 Furlong v. Johnston, 209 A.D. 198, 204 N.Y.S. 710 (4th Dep't 1924), aff'd, 239 N.Y. 141, 145 N.E. 910 (1924).

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1. In General

§ 146. Illegality as dependent upon legislative intent

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 92(1)

A.L.R. Library

Rights of assignee or subsequent holder of negotiable paper executed to a foreign corporation doing business in state without compliance with local requirements, 80 A.L.R.2d 465

Construction and effect of constitutional or statutory provisions precluding issuance of corporate stock in consideration of promissory notes, 78 A.L.R.2d 834

The mere fact that a statute is violated in a particular transaction does not render illegal a bill or note executed in the transaction.[1] In determining whether a bill or note made in violation of a law is legal or illegal, the test is the intention of the legislature[2] and the entire statute must be examined to determine such intent.[3] Under this rule, an action on a check is not barred by a violation of a law requiring that the check cashers be licensed where the statute does not evince a clear legislative intent to deprive the person of contractual rights.[4]

Comment:

Illegality may arise under a variety of statutes.[5] The statutes differ in their provisions and the interpretations given them.[6] They are primarily a matter of local concern and local policy.[7] All such matters are therefore left to the local law.[8] If under that law the effect of the illegality is to make the obligation entirely null and void, the defense may be asserted against a holder in due course; otherwise it is cut off.[9]

Footnotes

1 First Nat. Bank v. Town of Luverne, 235 Ala. 606, 180 So. 283 (1938); Furlong v. Johnston, 209 A.D. 198, 204 N.Y.S. 710 (4th Dep't 1924), aff'd, 239 N.Y. 141, 145 N.E. 910 (1924).
A bail bondsman's issuance of an appeal bond, which was terminated upon the attorney general's assertion that the trial court erroneously set bond in violation of the statute governing when to let bail for prisoners, was not an unlawful act, and thus the promissory note given in payment of the bondsman's fee was not void; the bondsman issued a bond that satisfied the terms set by the trial court, and the accused was released subject to the terms of the bond. Laas v. Wright, 191 S.W.3d 93 (Mo. Ct. App. S.D. 2006).

2 Pinney v. First Nat. Bank, 68 Kan. 223, 75 P. 119 (1904).

3 Mascari v. Raines, 220 Tenn. 234, 415 S.W.2d 874 (1967).

4 Messineo v. Kletz, 16 Misc. 2d 624, 185 N.Y.S.2d 397 (Sup 1959), order aff'd, 10 A.D.2d 734, 201 N.Y.S.2d 486 (2d Dep't 1960).

5 Official Comment 1 to U.C.C. § 3-305.

6 Official Comment 1 to U.C.C. § 3-305.

7 Official Comment 1 to U.C.C. § 3-305.

8 Official Comment 1 to U.C.C. § 3-305.

9 Official Comment 1 to U.C.C. § 3-305.
As to what constitutes a holder in due course, see §§ 214 to 223.

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1. In General

§ 147. Relation between illegality and consideration

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 92(1)

In order to prevent recovery on a bill or note on the ground of illegality, the connection of the plaintiff with the illegal transaction must be direct and not remote.[1] The test in determining whether the relation of an illegal transaction is sufficiently close to preclude recovery by the plaintiff is whether the plaintiff can establish his or her case without requiring the aid or proof of the illegal consideration; if so, the plaintiff may recover.[2]

Footnotes

1 Central Republic Trust Co. v. Evans, 378 Ill. 58, 37 N.E.2d 745 (1941).

2 Rogers v. First State Bank of Aguilar, 79 Colo. 84, 243 P. 637 (1926); Central Republic Trust Co. v. Evans, 378 Ill. 58, 37 N.E.2d 745 (1941).

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D. Illegal Consideration

1. In General

§ 148. Knowledge of intended unlawful use

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 92(1)

Where money is loaned or property is transferred as consideration for a bill or note, and such money or property is used or is further transferred in an illegal transaction, the question as to whether the bill or note is rendered unenforceable ordinarily turns on whether the payee participated in the illegal transaction or had knowledge of an intended illegal use.[1] As a general rule, consideration for a promise on commercial paper is illegal by force of the known intended use of the consideration, not by reason of such knowledge alone, but only where the promisee becomes a participant in the illegal design or act, as where money is advanced for the express purpose of being put to the intended use.[2] Thus, a person who advances money on a note is not precluded from recovery by the fact that the money was used corruptly or illegally if he or she did not know that the money was to be so used.[3]

Footnotes

1 Rose v. Nelson, 79 Cal. App. 2d 751, 180 P.2d 749 (1st Dist. 1947).

2 Johnson v. McMillion, 178 Ky. 707, 199 S.W. 1070 (1918).

3 Leite v. Dietz, 95 Cal. App. 2d 41, 212 P.2d 265 (1st Dist. 1949); Brock v. Wilson, 290 Ky. 425, 161 S.W.2d 637 (1942).

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D. Illegal Consideration

1. In General

§ 149. Partial illegality

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 92(1)

Partial illegality of consideration for a bill or note is generally regarded as being as complete a defense as is total illegality.[1] It has been recognized, however, that where there are distinct transactions, some of which are legal and some of which are illegal, constituting the total consideration for an instrument, and these transactions are separable, the payee or other holder may recover the legal portion of the obligation.[2]

Footnotes

1 Minor v. McDaniel, 210 Ga. App. 146, 435 S.E.2d 508 (1993); Johnson v. McMillion, 178 Ky. 707, 199 S.W. 1070 (1918).
If the consideration for a bill or note is in part illegal, the instrument is wholly void, at least in the event the illegal part is indefinite or inseparable from the remainder. Campbell v. Romfh Bros., Inc., 132 So. 2d 466 (Fla. 2d DCA 1961).

2 Parker v. Claypool, 223 Miss. 213, 78 So. 2d 124, 53 A.L.R.2d 340 (1955), judgment corrected on other grounds, 223 Miss. 213, 78 So. 2d 884 (1955) and (overruled on other grounds by, Pearce v. Ford Motor Co., 235 So. 2d 281 (Miss. 1970)).

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D. Illegal Consideration

1. In General

§ 150. Effect of renewal

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 92(1)

It is the general rule that the taint of illegality of consideration for a bill or note is not removed by renewal, and such illegality operates against the renewal,[1] and, even though made in compromise, as fully as against the original paper.[2]

Footnotes

1 Williams v. Turnbull, 1916 OK 1033, 65 Okla. 34, 162 P. 770 (1916).
Renewal, generally, see §§ 170 to 173.
A renewal note, which is given in place of an original note based upon a gambling consideration, has no more validity than the original note, and the same defense that can be made in a suit on the original note can be made in a suit on the renewed obligation. Kinker v. Aberegg, 40 Ohio App. 43, 8 Ohio L. Abs. 741, 177 N.E. 645 (6th Dist. Sandusky County 1930).

2 Fowler v. Cheirrett, 69 Idaho 224, 205 P.2d 502 (1949).

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2. Particular Transactions

§ 151. Concealment, suppression, or compounding of offense

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Bills and Notes 92(1)

The consideration for commercial paper is illegal, and the paper void and unenforceable as between the parties where it is given to conceal, suppress, or compound a crime.[1] Thus, a promissory note given in consideration for a promise to dismiss criminal charges is void as contrary to public policy.[2]

Consideration for an instrument, however, is not necessarily illegal because it bears some relation to a charge of crime, such as where the consideration of an instrument is the compromise of a legal claim arising out of the crime which does not involve any smothering of the crime or perversion of the use of the criminal law.[3] Similarly, an instrument executed to repay embezzled money is valid in the absence of a threat to prosecute or a promise to suppress prosecution.[4]

Footnotes

1 W.T. Joyce Co. v. Rohan, 134 Iowa 12, 111 N.W. 319 (1907); Union Exch. Nat. Bank of New York v. Joseph, 231 N.Y. 250, 131 N.E. 905, 17 A.L.R. 323 (1921); Board of Education of District of Northfork v. Angel, 75 W. Va. 747, 84 S.E. 747 (1915).
A promissory note given for a promise not to instigate a criminal prosecution for embezzlement was void as against public policy and good morals. Thom v. Stewart, 162 Cal. 413, 122 P. 1069 (1912).

2 Allen Foods, Inc. v. Lawlor, 94 S.W.3d 436 (Mo. Ct. App. E.D. 2003).

3 Blair Milling Co. v. Fruitager, 113 Kan. 432, 215 P. 286, 32 A.L.R. 416 (1923); O'Neil v. Dux, 257 Minn. 383, 101 N.W.2d 588 (1960).

4 Blair Milling Co. v. Fruitager, 113 Kan. 432, 215 P. 286, 32 A.L.R. 416 (1923); O'Neil v. Dux, 257 Minn. 383, 101 N.W.2d 588 (1960); Great Am. Indem. Co. v. Berryessa, 122 Utah 243, 248 P.2d 367 (1952).

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III. Consideration

D. Illegal Consideration

2. Particular Transactions

§ 152. Gambling

Topic Summary | Correlation Table | References

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Right to recover money lent for gambling purposes, 74 A.L.R.5th 369

Illegality is frequently a matter of gambling.[1] Thus, whether based on statute or public policy, the illegality of consideration arising out of a gaming or wagering transaction voids a bill or note at least as against the original parties and parties with notice.[2] Accordingly, an instrument is unenforceable by reason of illegality of consideration where the lender knows that the money loaned is to be used by the borrower in gambling[3] or for the promotion of an illegal lottery scheme.[4] The fact, however, that an instrument is used to raise money for gambling purposes does not preclude recovery on such instrument where the person advancing the money is without knowledge of such purpose.[5] Moreover, if checks are cashed at an establishment that runs a legitimate business as well as a gambling house, and if there is no restriction on the use of the money given in exchange for the checks, a jury may find that the transaction is not tainted with illegality.[6]

Footnotes

1 Official Comment 1 to U.C.C. § 3-305.

Enforceability of gambling transactions, generally, see Am. Jur. 2d, Gambling §§ 150, 151.

2 Fowler v. Cheirrett, 69 Idaho 224, 205 P.2d 502 (1949); Farmers' State Bank of Texhoma, Okl. v. Clayton Nat. Bank, 1925-NMSC-026, 31 N.M. 344, 245 P. 543, 46 A.L.R. 952 (1925).

Although forbearance from exercising a right is legal consideration, where the consideration for a note is forbearance from suing for money lost on previous wagers, the promissory note in question is concerned entirely with gambling and is void and unenforceable. Bayer v. Burke, 338 N.W.2d 293 (S.D. 1983).

3 Hamilton v. Abadjian, 30 Cal. 2d 49, 179 P.2d 804 (1947); Chapin v. Austin, 165 Misc. 414, 300 N.Y.S. 932 (Sup 1937).

The owner of a gambling house who honors a check for the purpose of providing a prospective customer with funds with which to gamble and who then participates in the transaction thus promoted by that act cannot recover on the check. Lane & Pyron, Inc. v. Gibbs, 266 Cal. App. 2d 61, 71 Cal. Rptr. 817 (3d Dist. 1968).

4 Sloss v. Holland, 38 Cal. App. 318, 176 P. 72 (3d Dist. 1918).

5 Birdsall v. Wheeler, 62 A.D. 625, 71 N.Y.S. 67 (3d Dep't 1901), aff'd, 173 N.Y. 590, 65 N.E. 1114 (1903).

6 Hamilton v. Abadjian, 30 Cal. 2d 49, 179 P.2d 804 (1947).

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III. Consideration

D. Illegal Consideration

2. Particular Transactions

§ 153. Usurious consideration

Topic Summary | Correlation Table | References

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Illegality is frequently a matter of usury.[1] Thus, where a transaction accompanying a bill or note is condemned by the usury statutes, the usury may preclude any recovery on such bill or note,[2] or may limit recovery to the principal and the legal rate of interest.[3]

Footnotes

1 Official Comment 1 to U.C.C. § 3-305.

2 Hare v. General Contract Purchase Corp., 220 Ark. 601, 249 S.W.2d 973 (1952); Consumers Credit Service v. Craig, 75 A.2d 525 (Mun. Ct. App. D.C. 1950); Modern Finance Co. v. Holz, 307 Mass. 281, 29 N.E.2d 922 (1940).
A note is invalid where a lender intends to extend a loan at an usurious interest rate. Elghanian v. Elghanian, 277 A.D.2d 162, 717 N.Y.S.2d 54 (1st Dep't 2000).

3 Braswell v. Tindall, 200 Tenn. 629, 294 S.W.2d 685 (1956).
As to the effect of usury, generally, see Am. Jur. 2d, Interest and Usury §§ 157 to 170.

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III. Consideration

D. Illegal Consideration

2. Particular Transactions

§ 154. Violation of public policy

Topic Summary | Correlation Table | References

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Illegality of consideration on a bill or note, by reason of contravention of public policy or good morals exists in a variety of contexts, such as where an instrument is given to influence public officials in the discharge of their official duties[1] or a fiduciary in discharge of his or her trust.[2] Consideration is likewise illegal where an instrument is given to effect an obstruction of justice,[3] an unlawful restriction or restraint on trade and commerce,[4] or free bidding for a contract for public works.[5]

Footnotes

1 Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 86 A.2d 201 (1952).

2 Anderson v. O'Briant, 3 S.W.2d 842 (Tex. Civ. App. Eastland 1928), writ refused, (Oct. 17, 1928).

3 Johnson v. McMillion, 178 Ky. 707, 199 S.W. 1070 (1918); Liberty Mut. Ins. Co. v. Gilreath, 191 S.C. 244, 4 S.E.2d 126, 129 A.L.R. 1148 (1939).

4 In re Holmes' Estate, 132 Kan. 443, 295 P. 716, 74 A.L.R. 285 (1931).

5 Federal Farm Mortg. Corp. v. Hatten, 210 La. 249, 26 So. 2d 735 (1946); Northwest Adjustment Co. v. Payne, 173 Or. 229, 144 P.2d 718 (1944).

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